

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)	
)	
Bloomberg L.P.,)	
Complainant,)	MB Docket No. 11-104
)	
v.)	
)	
Comcast Cable Communications, LLC,)	
Defendant.)	

**COMCAST CABLE COMMUNICATIONS, LLC'S
OPPOSITION TO APPLICATION FOR REVIEW**

DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W., Suite 700
Washington, DC 20037
(202) 783-4141

Attorneys for Comcast Cable Communications, LLC

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Comcast Cable Communications, LLC (“Comcast”), by its attorneys and pursuant to 47 C.F.R. § 1.115(d), hereby files this Opposition to the Application for Review filed by Bloomberg L.P.¹ (“Bloomberg”) challenging the *Memorandum Opinion and Order* granting in part Bloomberg’s complaint.² For the reasons discussed below and in Comcast’s Application for Review,³ the Commission should deny Bloomberg’s Application, grant Comcast’s Application for Review, reverse the *Order*, and deny Bloomberg’s Complaint.⁴

I. INTRODUCTION AND SUMMARY

Unsatisfied with the *Order* granting in part its Complaint, Bloomberg seeks even broader and more disruptive relief, without regard to the meaning and intention of the *Comcast-*

¹ *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104, Application for Review of Bloomberg L.P. (filed June 1, 2012) (“Application for Review”).

² *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104, *Memorandum Opinion and Order*, DA 12-694 (rel. May 2, 2012) (the “*Order*”).

³ *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104, Application for Review of Comcast Cable Communications, LLC (filed June 1, 2011) (“Comcast Application for Review”).

⁴ *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104, Complaint (filed June 13, 2011) (“Complaint”).

*NBCUniversal Order*⁵ and the hardship this relief would impose on customers and other cable networks. In essence, Bloomberg asks the Commission to compel Comcast to locate Bloomberg Television (“BTV”) next to CNBC throughout its lineups – even though the Commission declined in the *Comcast-NBCUniversal Order* to require this as part of the news neighborhooding condition.⁶ If accepted by the Commission, Bloomberg’s Application for Review would have significant and adverse long-term ramifications for Comcast’s ability to manage its own channel lineups, for Comcast’s subscribers, and for other programming networks Comcast carries, without any regard to “discriminatory” conduct by Comcast. These consequences would be magnified to the extent that other news networks request relocation under the Condition.

Bloomberg’s principal argument is that, contrary to the Media Bureau’s ruling, Comcast should be required to carry BTV not just in one news neighborhood, but in *every* news neighborhood found on a given lineup – even if this means that BTV appears in several different channel locations. This over-reaching claim is without merit. *First*, Bloomberg’s interpretation is inconsistent with the plain language of the Condition, which expressly contemplates placement in a single neighborhood. Indeed, as the Media Bureau correctly recognized, Bloomberg’s position is foreclosed by the record in the Comcast-NBCU transaction, where the Commission *already rejected* this same argument from Bloomberg at the time the Condition was first adopted. *Second*, Bloomberg’s suggestion that it must be carried in the “most viewed” neighborhood or adjacent to its major competitor (CNBC in its case, according to Bloomberg) is

⁵ *Applications of Comcast Corp., General Electric Co., and NBC Universal Inc. for Consent To Assign Licenses and Transfer Control of Licensees*, 26 FCC Rcd 4238 (2011) (the “*Comcast-NBCUniversal Order*”).

⁶ *Id.*, 26 FCC Rcd at 4358 § III.2 (the “Condition”).

wholly unsupported by the text of the Condition, and finds no support whatsoever in the record of the Comcast-NBCUniversal proceeding. *Third*, accepting Bloomberg’s position would maximize the disruption caused to customers and other programming networks, particularly because the Condition applies not only to BTV but also to any other independent news network that requests relocation pursuant to the Condition (although Comcast believes that even the Media Bureau’s definition finds no support in the Condition or the “legislative” history of the Condition). The wide-ranging result suggested by Bloomberg – i.e., that Comcast would be required to relocate multiple news networks into *every* so-called neighborhood on its lineups – would be wholly at odds with the Commission’s stated intent that the Condition is “narrowly tailored” to avoid exactly these issues.

Bloomberg also complains both that the Media Bureau neglected to define a “news network” for purposes of the Condition and that it erroneously characterized several networks as “news networks.” Bloomberg is incorrect on both counts. The Media Bureau adequately defined the criteria that it used to determine whether a network qualifies as a “news network” for purposes of the Condition. Moreover, the Media Bureau correctly recognized that networks such as BBC World News, Current TV, Link TV, and MHz Worldview satisfied that criteria on the basis of their programming as reflected in the record.

Bloomberg’s Application for Review also highlights the serious First Amendment problems created by the Media Bureau’s *Order*. The Media Bureau erroneously declined to engage in a careful First Amendment analysis regarding what effect the *Order* would have upon Comcast’s editorial discretion, insisting instead that no such analysis was required because Comcast retained discretion regarding where to relocate BTV in those lineups containing multiple news neighborhoods. Bloomberg now contends that Comcast should be denied even

that meager discretion and that the Commission should compel Comcast to carry BTV in every neighborhood. This complete denial of editorial discretion certainly cannot withstand First Amendment scrutiny.

For these reasons and for the reasons set forth in Comcast's Application for Review, the Commissions should dismiss the Application for Review, grant Comcast's Application for Review, reverse the *Order*, and dismiss Bloomberg's complaint.

II. THE CONDITION DOES NOT REQUIRE COMCAST TO CARRY BTV IN MULTIPLE NEWS NEIGHBORHOODS

Bloomberg devotes the majority of its Application to arguing that Comcast should be required to carry BTV in *every* news neighborhood in Comcast lineups, even where those lineups contain multiple news neighborhoods.⁷ According to Bloomberg, the Media Bureau's decision not to compel Comcast to carry BTV in all news neighborhoods is arbitrary and capricious and conflicts with the plain language of the Condition and the Commission's policy intent underlying the Condition.⁸ Not only is Bloomberg plainly wrong, but its position also underscores the flaws inherent in the Bureau's decision to adopt Bloomberg's definition of a news neighborhood.

⁷ Bloomberg asserts that its Complaint deals only with the placement of its standard definition ("SD") feed and tries to reserve the right to file yet another complaint dealing with the placement of its high definition ("HD") feed. Application for Review at 5, n.15. At the request of the Media Bureau, both parties will be addressing this issue in submissions to be filed on June 19, 2012, and June 21, 2012. At this juncture, Comcast notes that because Bloomberg's Complaint submitted data regarding only lineups on BTV's SD feed, Comcast's Answer generally included analysis only of SD lineups as well so that the data could be fairly compared. See *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104, Answer at 31-35 (July 27, 2011) ("Answer") at 21 n.71. Comcast hereby also corrects the record with regard to that footnote – Comcast did have a license to carry BTV in HD at that time.

⁸ Application for Review at 7-18.

A. The Plain Language of the Condition Does Not Require Comcast To Carry BTV in Multiple News Neighborhoods on a Single Lineup.

As an initial matter, the plain language of the Condition makes it clear that Comcast is not required to carry BTV in multiple news neighborhoods. As the Media Bureau correctly pointed out, the Condition is triggered if Comcast carries news channels “in *a* neighborhood,” which then requires that other news channels be carried “in *that* neighborhood.”⁹ Contrary to Bloomberg’s contention,¹⁰ the Commission’s use of singular terms – “*a* neighborhood” and “*that* neighborhood” – plainly contemplates a single news neighborhood and does not, as Bloomberg contends, require Comcast to carry BTV in multiple news neighborhoods.¹¹

Bloomberg’s attacks on the Bureau’s logical reading of this provision are unavailing. First, Bloomberg incorrectly asserts that the Bureau “fails to address the Commission’s stated concern with equitable ‘channel placement.’”¹² But there is nothing “inequitable” about the *Order*’s approach – i.e., placing BTV in any one news neighborhood on a lineup.¹³ The Commission language quoted by Bloomberg simply suggests that the Commission wanted to ensure that Comcast did not discriminate against independent news networks by placing them in an isolated channel position, thereby “making it more difficult for subscribers to find the programming.”¹⁴ This is logically addressed by a requirement that BTV be placed with a sizable group of other news networks (consistent with Comcast’s proposed approach) – not by a

⁹ *Order* ¶ 19 (emphasis added).

¹⁰ Application for Review at 13.

¹¹ *Id.*

¹² Application for Review at 8.

¹³ *Comcast-NBCUniversal Order*, 26 FCC Rcd at 4241.

¹⁴ Application for Review at 8 (quoting *Comcast-NBCUniversal Order*, 26 FCC Rcd at 4285).

requirement that BTV be placed in as many as three “news neighborhoods” throughout a lineup, or next to its chief competitor (particularly when Bloomberg and the competing channel received their channel positions before Comcast had any ownership interest in the channel). Placing BTV in every “news neighborhood” on a lineup would not be “equitable”: it would favor BTV over almost every other news network, none of which is consistently present in multiple news neighborhoods, including several unaffiliated news networks (such as CNN and Fox Business) that would not qualify as independent news networks under the FCC’s definition and would therefore be unable to demand the same preferential treatment that BTV would be receiving.

Second, Bloomberg claims that the Media Bureau’s decision ignores “the basic rule of construction that the singular generally includes the plural.”¹⁵ This principle of construction, however, “does not require that singular and plural word forms have interchangeable effect,” as Bloomberg suggests.¹⁶ Rather, “discrete applications are favored except where the contrary intent or reasonable understanding is affirmatively indicated.”¹⁷

In fact, in its leading case on point, the Supreme Court rejected an argument directly analogous to Bloomberg’s here. In a case involving the interpretation of statutes governing banking activity, the Supreme Court held:

Strictly, the latter provision, employing, as it does, the article “an,” to qualify words in the singular number, would confine the association to one office or banking house. We are asked, however, to construe it otherwise in view of the rule that “words importing the singular number may extend and be applied to several persons or things.” But obviously this rule is not one to be applied except where it is necessary to carry out the evident intent of the statute. Here there is not only nothing in the context or in the subject matter to require the construction contended for, but

¹⁵ Application for Review at 9.

¹⁶ Singer & Singer, *Sutherland Statutory Construction* § 47:34 (7th ed. 2007).

¹⁷ *Id.*

other provisions of the national banking laws are persuasively to the contrary.¹⁸

Similarly, it is not necessary to construe the singular phrases “a neighborhood” and “in that neighborhood” in the Condition as applying to plural neighborhoods to carry out the evident intent of the Condition. To the contrary, it is necessary to give these phrases their plain meaning as applying only to a single neighborhood in order to prevent the anomalous result that BTV would appear in multiple neighborhoods on certain Comcast lineups.¹⁹

In sum, the plain language of the Condition confirms the Media Bureau’s conclusion that the Condition does not apply to multiple neighborhoods.

B. The History of the Condition Confirms that Comcast Is Not Required to Carry BTV in Multiple Neighborhoods.

As with the plain language of the Condition, the history of the Condition confirms that it does not require Comcast to carry BTV in multiple neighborhoods. The Bureau correctly recognized that Bloomberg proposed language that envisioned multiple news neighborhoods, but the Commission declined to adopt Bloomberg’s proposals.²⁰ Most notably, on January 18, 2011, the day the Commission adopted the *Comcast-NBCUniversal Order*, Bloomberg proposed the following “Change to Condition Language”: “Comcast must carry all independent news and business news channels in that AND ALL SUCH *neighborhoods*.”²¹ The Commission declined

¹⁸ *First Nat’l Bank v. Missouri*, 263 U.S. 640, 657 (1924) (citations omitted).

¹⁹ Answer at 31-35.

²⁰ Answer at 34.

²¹ Letter from Markham C. Erickson, Holch & Erickson LLP, Counsel for Bloomberg, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-56 (Jan. 19, 2011) (“Jan. 19 *Ex Parte*”). The words “AND ALL SUCH” appear in capital letters in the Jan. 19 *Ex Parte*.

to make that change.²² The Media Bureau reasonably found that these facts were powerful evidence that the Commission did not intend the Condition to apply to multiple neighborhoods.²³

Bloomberg's attempt at rebutting this straightforward point is wholly unconvincing. According to Bloomberg, even though the Commission expressly declined to adopt language requiring placement in multiple neighborhoods, that decision does not necessarily mean that the Commission intended for the Condition to apply to only one neighborhood on a lineup.²⁴ Instead, Bloomberg speculates that the Commission may have had a litany of other reasons for rejecting Bloomberg's proposals.²⁵ At bottom, however, Bloomberg does not and cannot deny these basic facts, all of which were properly recognized by the Media Bureau: (1) Bloomberg proposed language that would have expressly covered multiple news neighborhoods to the Commission three different times in the days leading up to the *Comcast-NBCUniversal Order*; (2) the Commission did not adopt Bloomberg's proposed language or other language such as "any," "each," "every," or "such" that might have suggested the possibility of multiple neighborhoods; and, (3) the Commission used the singular forms "a neighborhood" and "in that neighborhood" instead.²⁶

²² Nor did the Commission adopt different language proposed by Bloomberg on January 14 and 16, 2011, that would have encompassed multiple news neighborhoods. *See* Letter from Markham C. Erickson, Holch & Erickson LLP, Counsel for Bloomberg, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-56 (Jan. 18, 2011).

²³ *Order* ¶ 21, n.72.

²⁴ Application for Review at 12.

²⁵ *Id.*

²⁶ In the face of this compelling evidence of the Commission's intent, Bloomberg relies instead upon an entirely separate condition of the *Comcast-NBCUniversal Order*, which deals with the wholly unrelated topic of set top boxes, in which the Commission addressed concerns that Comcast might use IP-enabled set top boxes to discriminate against unaffiliated online content. In addition to being irrelevant to interpreting the Condition, the text of the set top box provision is most naturally and reasonably read in the plural form. Reading it any other way

Accordingly, the history of the Condition further confirms the Media Bureau's interpretation that the Condition does not apply to multiple neighborhoods.

C. The Bureau's Interpretation of the Condition Appropriately Gave Weight to the Burdens and Disruptions That Would Be Imposed Upon Comcast's Subscribers and Other Programming Networks.

Contrary to Bloomberg's claims, the Bureau appropriately gave weight to the potential burden on Comcast that would result should implementation of the Condition cause a "major realignment of [Comcast's] channel lineups."²⁷ As the Bureau correctly recognized, the Commission "narrowly tailored" the Condition specifically "to limit major channel realignments and the cost and customer disruptions associated with those realignments."²⁸ Indeed, the Commission has long acknowledged the importance of limiting customer disruption and has been willing to stay the effectiveness of its orders to "avoid disruption of service to . . . subscribers."²⁹ Most recently, the Commission, on its own motion, stayed the effectiveness of the Initial Decision issued in *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, in part because, absent a stay, Comcast might otherwise "have to undertake multiple channel realignments to implement the channel placement remedy," and

would have the illogical result of the conditions applying only to one specialized service, even if the set top box in question provides access to multiple specialized services. Nothing in the *Comcast-NBCUniversal Order* suggests that the Commission intended this peculiar result.

²⁷ Application for Review at 14 (quoting *Order* ¶ 20).

²⁸ *Order* ¶ 21.

²⁹ See, e.g., *Southern Television System Corp.*, 6 FCC 2d 569 (1966) (five-month waiver); *Pennwire Television Co.*, 5 FCC 2d 758, 759 (1966) (25-month waiver). The Commission has also granted permanent rule waivers to avoid "unnecessary subscriber confusion" in situations where "subscribers . . . have grown accustomed to the presence of [a particular broadcast station] in their channel lineup and "would discover . . . that the channel has disappeared" *Nevada Channel 3, Inc.*, 21 FCC Rcd 1884, 189 (MB 2006); *accord TV 34, Inc.*, 20 FCC Rcd 20522, 20527-28 (MB 2005).

granting a stay “*will avoid potential disruption to consumers and any affected third-party programmers.*”³⁰

Bloomberg asserts that Comcast has exaggerated the concerns about the burdens associated with large scale channel realignments, and that the Bureau therefore should not be guided by this concern.³¹ Bloomberg’s arguments here rely on grossly misleading statistics that Comcast has already thoroughly rebutted in its Surreply.³² The facts as demonstrated in the Surreply are these, between 2010 and 2011: (1) **45 percent** of Comcast’s lineups ***experienced no channel relocations in the 1–99 range***; and, (2) **95 percent** of Comcast’s lineups experienced ***less than one channel relocation on average***.³³ The majority of changes cited by Bloomberg were attributable to 5 percent of Comcast’s headends, many of them serving only a few thousand customers, which were either consolidated with nearby headends or underwent upgrades to their physical plant.³⁴ Any disruption occasioned by these changes, affecting only five percent of Comcast’s lineups and an even smaller percentage of its subscribers, cannot be compared to the disruption that would result from Bloomberg’s interpretation of the Condition, which would require reordering **84 percent** of Comcast’s lineups affecting the overwhelming majority of its subscribers.³⁵ The Media Bureau properly credited Comcast’s detailed explanations instead of Bloomberg’s misleading conjecture.

³⁰ *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, Order, FCC 12-50, ¶ 5 (rel. May 14, 2012) (emphasis supplied).

³¹ *Id.* at 15-16.

³² *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104, Surreply of Comcast Cable Communications, LLC, at 18-22 (filed Sept. 28, 2011) (“Surreply”). The Bureau granted Comcast leave to file a surreply. *Order* ¶ 4 n.21.

³³ Surreply, Ex. 2, Supplemental Declaration of Mark Israel, at ¶ 8 & Table 2.

³⁴ *Id.*

³⁵ *See* Answer Ex. 4 (Egan Decl.) ¶ 36 (identifying 507 of 602 such headends).

Comcast further demonstrated that channel realignments of the magnitude Bloomberg contemplates would in fact cause significant customer disruption and have an extraordinarily adverse effect on Comcast's ability to maintain customer satisfaction and service quality.³⁶ And Bloomberg's assertion that consumers will ultimately benefit from such relocations – because news networks will be easier to find because they will be grouped more logically – is ironically dependent upon Comcast creating a single large news neighborhood.³⁷ There is no reason to think that moving one or two independent news networks to existing small neighborhoods, which may be scattered throughout a lineup, would have any particular benefit for Comcast subscribers. If Bloomberg is correct and the goal of the Condition is to have Comcast organize news networks logically so that they can be easier to find, the Condition should be read to apply only to broad groupings of 10–15 news channels (as Comcast has contended all along).

Bloomberg's further suggestion that there would be no additional burden associated with allowing it to pick the neighborhood in which Comcast carries BTV is meritless.³⁸ There is nothing in the *Comcast-NBCUniversal Order* or the language of the Condition itself that would suggest that the Commission intended actively to favor Bloomberg by allowing it to “cherry-pick” its channel position. Moreover, that approach would cede a degree of editorial discretion over Comcast's channel placements to either Bloomberg or the FCC that would be a clear affront to the First Amendment.³⁹

³⁶ See Answer at 35-43.

³⁷ Application for Review at 16-17 (“the addition of other new[s] channels on Comcast headends will be a benefit to consumers as it will become a larger neighborhood with news channels grouped more logically and news channels will be easier to find.”)

³⁸ Application for Review at 16.

³⁹ See *infra* Section IV; see also Answer at 19-20; Comcast Application for Review at 23-25. Comcast does not contend that the Commission was without authority to adopt the Condition, but contends that Bloomberg's proposed construction and application of the

And as a practical matter, ceding control of channel placement to individual networks in this way would effectively hamstring Comcast's ability to manage its channel lineups at all, leading to significant additional disruption to customers and other programming networks. Comcast already has an obligation to manage its lineups within the constraints imposed by the presence of broadcast channels (whose carriage is federally mandated) and "PEG" channels (whose carriage is imposed by local franchise authorities). Ceding control of channel placement to independent networks – whose decision-makers will likely not share Comcast's concerns with respect to these "must-carry" networks – will make it more difficult for Comcast to fulfill that obligation. In addition, because the Condition applies broadly to other independent news networks that may seek relocation, Comcast would potentially be required to realign its channel lineups repeatedly in order to accommodate each independent news network's particularized request for relocation into the specific news neighborhood – and possibly channel slot – of its choice. Presumably, these preferences would also change over time as one news network or another becomes more popular or changes its format to compete more directly with another news network, thereby exposing Comcast to multiple rounds of requests for relocation based upon changing preferences. That is not what the Commission intended or what the Condition requires.

Finally, Bloomberg's concern that Comcast may try to "create a news neighborhood by adding channels to BTV's current location"⁴⁰ is belied by Comcast's Extension Motion and its subsequent Stay Motion and should be disregarded.⁴¹ Comcast has no plans to do so.

Condition would infringe on Comcast's constitutionally protected editorial discretion. *See* Letter from Kathryn A. Zachem, Vice President, Regulatory and State Legislative Affairs, Comcast Corporation, *et al.* to Marlene H. Dortch, Secretary, Federal Communications Commission (Jan. 21, 2011).

⁴⁰ Application for Review at 17-18.

⁴¹ *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104,

D. The Condition Does Not Require News Networks To Be Carried in the “Most Viewed” Neighborhoods or Adjacent to their Major Competitors.

The Media Bureau properly rejected Bloomberg’s claim that, in order to effectuate the purpose of the Condition, independent news networks must be placed in the most viewed neighborhoods and that BTV be located near its largest competitor CNBC.⁴² The Condition requires neither. Bloomberg’s demands would have the Commission transform the terms of the Condition into a requirement that Comcast actively favor BTV and other independent news networks, rather than the safeguard against discriminatory behavior that it was intended to be.

To begin with, the plain language of the Condition says nothing about a news channel getting to be placed next to its “competitor of choice”; nor does it suggest that some neighborhoods might be better than others. It simply provides that “if Comcast now or in the future carries news and/or business news channels in a neighborhood [. . .] Comcast must carry all independent news and business news channels in that neighborhood.” Further, Bloomberg’s assessment of the Commission’s intent finds no support in the text of the *Comcast-NBCUniversal Order* or the record underlying the order. Nowhere does the Commission require Comcast to put independent news networks in “the most viewed neighborhoods,” much less define what that phrase would mean or how Comcast should identify what constitutes “most viewed neighborhoods.” Nor does the Commission state in any way that BTV should be located

Motion for Partial Extension of Time (filed June 1, 2012) (“Extension Motion”); *Bloomberg L.P. v. Comcast Cable Communications, LLC*, MB Docket No. 11-104, Motion for Expedited Stay (filed June 8, 2012) (“Stay Motion”).

⁴² *Id.* at 12-14. *Order* at ¶ 17 (“Finally, Bloomberg stated that it ‘is content to be carried only in the neighborhood that carries CNBC,’ so long as Comcast carries Bloomberg Television in every neighborhood that carries CNBC. We do not believe that the Commission intended any of the remedies that Bloomberg requests.”), ¶ 24 (“[W]e reject Bloomberg’s contention that it is entitled . . . to be in the neighborhood that contains CNBC.”).

near CNBC. In fact, the history of the Condition makes it clear that the Commission *declined* to mandate that Comcast locate BTV near CNBC.

Until very late in the merger process, Bloomberg argued that Comcast should be required to “reorganize its channel placement alignment so that business news channels are adjacent and contiguous to CNBC and any similar Comcast business news channels.”⁴³ Bloomberg claimed that cable systems, like Comcast, were “*expected* to adopt neighborhooding as they transition to digital technology,”⁴⁴ but that they had not yet done so to any significant degree.⁴⁵ Bloomberg argued that Comcast’s control of CNBC and MSNBC would remove Comcast’s natural incentives to move toward neighborhooding (*e.g.*, to expand the MCLU)⁴⁶ and therefore

⁴³ *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, Petition to Deny of Bloomberg L.P. at 33 (“Bloomberg Petition to Deny”); *see also id.* at 31 (“Absent the merger, BTV would have expected Comcast to neighborhood its channel line-up quickly to compete with other MVPDs . . .”).

⁴⁴ Bloomberg Petition to Deny at 29; Answer Ex. 9 (Bloomberg Reply to Opposition) at 30.

⁴⁵ Bloomberg Petition to Deny at 33 (“the Commission should deny the Merger or condition the merger to require neighborhooding. At the very least, the FCC should prevent Comcast from leaving BTV [. . .] in disadvantageous channel positions *when* Comcast’s cable systems create genre-related neighborhoods”) (emphasis added).

⁴⁶ Answer Ex. 8A (Bloomberg Response to Petitions to Deny and Comments) at 3. *See also* Letter from Stephen Diaz Gavin, Patton Boggs LLP, Counsel to Bloomberg, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-56 (June 21, 2010), Testimony of Gregory Babyak, at 2 (March 25, 2010) (“Although other MVPDs are expected to transition to neighborhooding as they transition to fully digital technology, as a result of the transaction, Comcast will have a strong disincentive to hinder this pro-consumer development on its systems.”); Letter from Stephen Diaz Gavin, Patton Boggs LLP, Counsel to Bloomberg, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 18, 2010), Attachment “The Commission Should Require Comcast to Neighborhood News Channels to Preserve Diversity and Competition in News” at 3, 29-30 (“If the Transaction had not been proposed, BTV would have expected to be neighborhooded with other business news channels as Comcast neighborhooded all of its systems.”); Petition to Deny of Bloomberg L.P., Marx Economic Report, at 28 [¶ 94] (“[I]n the absence of the transaction, it would be likely that Bloomberg TV would be positioned in the same ‘neighborhood’ as CNBC when Comcast realigns its channel locations . . .”).

demanded that the Commission *require* Comcast to neighborhood business news networks. The Commission, however, *rejected* this approach and instead adopted the “narrowly tailored” Condition.⁴⁷

There is absolutely nothing in the text or history of the Condition or the record upon which it was based that even remotely supports Bloomberg’s assertion that it must be carried in the “most viewed neighborhood,” a new construct that Bloomberg seems to have coined only recently. In short, both unsupported claims should be wholly disregarded here.

III. THE BUREAU’S DEFINITION OF A NEWS NETWORK IS WELL SUPPORTED BY THE RECORD

Bloomberg also criticizes the Media Bureau for its alleged failure to identify those networks in Comcast’s lineups that are news networks and argues that *if* the Bureau *did* in fact articulate a definition of a news network, that Bureau decision was arbitrary and unsupported.⁴⁸ Both of these arguments are without merit.

First, the *Order* plainly set forth the criteria that the Media Bureau used to define a “news channel.” The *Order* states that “the term ‘news channels,’ as used in the Condition, refers to channels whose programming during the hours from 6:00 a.m. to 4 p.m. is focused on reporting and analysis relating to public affairs or local affairs of general interest or relating to business.”⁴⁹ The *Order* goes on to specify that “business news channels are the only specialty news channels

⁴⁷ *Comcast-NBCUniversal Order*, 26 FCC Rcd at 4288.

⁴⁸ Application for Review at 20-22. Bloomberg also asked the Commission to clarify that it should not be required to file a program carriage complaint to challenge the Bureau’s findings in this regard. *Id.* at 20. Regardless of what procedural mechanism is used, however, Bloomberg cannot avoid the fact that, as the party seeking Commission relief, it will bear the ultimate burden of persuasion and thus must come forward with substantial evidence in support of its position. See 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”).

⁴⁹ *Order* ¶ 15.

– news channels that do not provide public affairs or local news of general interest – which the Commission intended to include in the news neighborhooding analysis.”⁵⁰ Thus, the concept of news networks for purposes of the Condition includes networks that provide “general interest news programming” and business news networks, but does not include “specialty news channels dedicated to a sub-genre of news programming (such as channels devoted to sports or weather news) or Public, Educational, and Governmental access channels.”⁵¹ The *Order* also concludes that, at a minimum, BBC World News, Current TV, Link TV, and MHz Worldview are news channels (based on their programming as reflected in the record).⁵² In short, the Media Bureau provided adequate guidance to determine whether a channel qualifies as a news network under its approach.

Second, Bloomberg’s challenge to the Bureau’s determination that Current TV and Link TV are news networks is without merit.⁵³ The Bureau’s judgment in this regard is logically sound and based on substantial evidence. Bloomberg would exclude Current TV and Link TV from the category of news networks because, in Bloomberg’s judgment, these channels do not focus sufficiently on “news reporting and analysis.”⁵⁴ As explained in Comcast’s Surreply, while programming content can change over time, these networks today carry serious documentaries, discussions, speeches, legislative sessions, and panels. If these do not reliably qualify as “public affairs” programming for purposes of the Condition, then it is not clear how

⁵⁰ *Id.*

⁵¹ *Id.* ¶ 5; *see also id.* ¶ 15.

⁵² *Id.* ¶ 16 n.60 (“... Bloomberg excluded *news channels like BBC World News, Current TV, Link TV, and MHz Worldview* from its analysis.” (emphasis supplied)).

⁵³ Application for Review at 21.

⁵⁴ *Id.*

any party could ever say with certainty what would.⁵⁵ The Media Bureau correctly credited this evidence, and acknowledged the “news” nature of these networks.

IV. BOTH BLOOMBERG’S PROPOSED APPROACH AND THE MEDIA BUREAU’S ORDER WOULD VIOLATE COMCAST’S FIRST AMENDMENT RIGHTS

The remedies imposed by the Media Bureau and the remedies proposed by Bloomberg raise two separate, serious First Amendment concerns. *First*, the fine, content-based distinctions advocated by Bloomberg in its Application for Review, regarding what is and is not a news network would result in perpetual complaints and Bureau proceedings about what is or is not a news channel, with resulting upheaval if a “news” channel (and the neighborhood in which it sits) is suddenly disqualified. That approach is not only distasteful from a First Amendment perspective, but would also result in continual litigation and disruption, which would be the antithesis of the “narrowly tailored” remedy that the Commission said it was adopting. Nothing in the *Comcast-NBCUniversal Order* or the language of the Condition itself that would suggest that the Commission intended such a result.

Second, as set forth in Comcast’s Application for Review, the Media Bureau’s *Order* raises significant First Amendment concerns by limiting Comcast’s editorial discretion and requiring Comcast to re-engineer long-standing channel lineups across hundreds of headends.⁵⁶

⁵⁵ See Surreply at 15-16, and Ex. 1 (Egan Supp. Decl.) ¶¶ 41–44, 49. For example, public affairs programming “deal[s] with local, state, regional, national, or international issues or problems, including, but not limited to, talks, commentaries, discussions, speeches, editorials, political programs, documentaries, mini-documentaries, panels, roundtables and vignettes, and extended coverage of public events or proceedings, such as local council meetings, congressional hearings and the like.” *In the Matter of Revision of FCC Form 303, Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto*, Report and Order, Docket No. 20419, 59 FCC 2d 750, ¶ 47 (1976).

⁵⁶ Comcast Application for Review at 23-25.

The approach advocated by Bloomberg is even more problematic and imposes even greater burdens on Comcast’s editorial decision-making regarding channel placement. Specifically, Bloomberg would have the Commission replace Comcast’s judgment about where BTV (and other independent news networks) should be located with the judgment of BTV (or such other independent news networks). Such relief would raise insurmountable First Amendment problems and the Commission should proceed cautiously before endorsing such a radical position. The Supreme Court has made clear that “[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”⁵⁷ This protection extends to the “exercis[e] [of] editorial discretion over which stations or programs to include in [the cable operator’s] repertoire,”⁵⁸ and requires considerable deference to Comcast’s editorial decisions.⁵⁹

In short, the Commission must be certain that *any* action it requires here is narrowly tailored – as the Condition professes to be – to serve a compelling government interest.⁶⁰ Accordingly, the Commission should act with caution in interpreting and applying this Condition, and should *minimize* the Condition’s inherent impact on Comcast’s protected speech

⁵⁷ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“*Turner I*”).

⁵⁸ *Id.* (quoting *Los Angeles v. Preferred Commc’ns, Inc.*, 473 U.S. 488, 494 (1986)).

⁵⁹ *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979) (“[W]e are unable to ignore Congress’ stern disapproval . . . of negation of the editorial discretion otherwise enjoyed by . . . cable operators”); *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1135 (D.C. Cir. 2001) (“[W]e cannot see how the word unfair could plausibly apply to . . . legitimate, independent editorial choices”); *cf CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) (“The Commission has stated that, in enforcing [Section 312(a)(7) of the Communications Act of 1934], it will provide leeway to broadcasters and not merely attempt *de novo* to determine the reasonableness of their judgments.” (internal quotation marks omitted)).

⁶⁰ *See Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 800 (1988) (holding that the First Amendment prohibits the government from compelling speech “absent compelling necessity, and then, only by means precisely tailored”).

– guidance that is at odds with Bloomberg’s unsupported, expansive interpretation of the Condition.

V. CONCLUSION

For the foregoing reasons and the reasons set forth in Comcast’s Application for Review, the Commission should deny Bloomberg’s Application for Review,⁶¹ grant Comcast’s Application for Review, and deny Bloomberg’s complaint.

⁶¹ Bloomberg also seeks clarification that the Condition requires Comcast to carry BTV “on each headend’s news neighborhood in a multi-headend system.” Application for Review at 19-20. As set forth in Comcast’s submission of May 22, coupled with its Motion for Partial Extension of Time, and its Motion for Stay, Comcast intends to implement the *Order* with regard to each individual channel lineup that contains a news neighborhood in the relevant DMAs. Bloomberg’s request for clarification is therefore moot.

Respectfully submitted,

COMCAST CABLE COMMUNICATIONS, LLC

Sarah L. Gitchell
Thomas R. Nathan
Comcast Cable Communications, LLC
One Comcast Center
Philadelphia, PA 19103

Lynn R. Charytan
Justin Smith
Frank La Fontaine
Comcast Corporation
2001 Pennsylvania Avenue, N.W.
Suite 500
Washington, D.C. 20006

By: /s/ Arthur J. Burke
Michael P. Carroll
Arthur J. Burke

DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

David H. Solomon
J. Wade Lindsay
WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W., Suite 700
Washington, DC 20037
(202) 783-4141

Attorneys for Comcast Cable Communications, LLC

June 18, 2012

VERIFICATION

I, Arthur J. Burke, do hereby declare and state under penalty of perjury as follows:

1. I am a partner in the law firm of Davis Polk & Wardwell LLP, and
2. I have read the foregoing Opposition to Application for Review of Comcast Cable Communications, LLC. To the best of my personal knowledge, information, and belief, the statements made in this Opposition, other than those of which official notice can be taken, are well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. This Opposition is not interposed for any improper purpose.

June 18, 2012

/s/ Arthur J. Burke

Arthur J. Burke

CERTIFICATE OF SERVICE

I, Arthur J. Burke, hereby certify that, on June 18, 2012, copies of the attached “Comcast Cable Communications, LLC’s Opposition to Application for Review” were filed through the Commission’s Electronic Comment Filing System and served by hand delivery to the following:

Stephen Diaz Gavin
Kevin J. Martin
Janet F. Moran
Patton Boggs LLP
2550 M. Street, N.W.
Washington, DC 20037

Robert Silver
Boies Schiller & Flexner LLP
575 Lexington Avenue, 7th Floor
New York, NY 10022

In addition, a copy of the attached “Comcast Cable Communications, LLC’s Opposition to Application for Review” was served by email to:

Brendan Murray
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 4-A373
Washington, DC 20554

/s/ Arthur J. Burke
Arthur J. Burke